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IN THE

Supreme Court of the United States

JEANNE S. WOODFORD
AND ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT VIET MIKE NGO

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QUESTION PRESENTED

Where a prisoner has pursued his available administrative remedies but his grievance has been rejected by prison officials on procedural grounds, such that no remedies remain available, is the Prison Litigation Reform Act's requirement that the prisoner delay bringing an action "until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a), satisfied?

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

42 U.S.C. § 1997e(c)(2) provides: "In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies."

STATEMENT

This case addresses whether prison officials' rejection of a prisoner's grievance on procedural grounds permanently bars the prisoner's constitutional claims from federal court under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C, § 1997e, which prevents prisoners from filing suit until administrative remedies "are exhausted." The United States Court of Appeals for the Ninth Circuit (Pregerson and Kozinski, JJ., and Rhoades, D.J.) held that the PLRA does not create any such procedural default sanction for procedural missteps in a prison or jail grievance system. Petitioners seek a reversal of that ruling.

A. Factual Background

On October 26, 2000, respondent Viet Mike Ngo, an inmate at San Quentin State Prison, was placed in administrative segregation as punishment for alleged "inappropriate activity" with Catholic volunteer priests. Pet. App. 2, J.A. 12. Ngo was not issued any disciplinary report, and was never found guilty of any rules violation. J.A. 4, 13.

On December 23, 2000, Ngo was released from administrative segregation, but petitioner Kane, the Chief Deputy Warden, with the knowledge and approval of

petitioner Woodford, the Warden, prohibited him from communicating with a particular volunteer in the San Quentin Catholic Chapel and from participating in "Special Programs." As a result, Ngo was restricted from participating in Catholic observances such as the Sacrament of Confession, Holy Week services, and Bible study, as well as educational and volunteer activities. *Id.* at 4-5, 8. The Board of Prison Terms has deemed participation in such programs critical or mandatory for parole eligibility. *Id.* at 10.

After trying and failing to have petitioner Kane remove the restrictions, on June 18, 2001, Ngo submitted a formal grievance to the prison Appeals Coordinator challenging this ongoing disciplinary action. The Appeals Coordinator refused to accept the appeal for filing on the ground that Ngo had not submitted it within the time period allowed by California prison regulations, which is "within 15 working days of the event or decision being appealed," CAL. CODE REGS. tit. 15, § 3084.6(c). See J.A. 25. The form on which the decision was recorded noted that the decision could not be appealed. *Id.* at 26. Ngo submitted a second filing on June 25, 2001, arguing that his appeal was timely because the continuing denial of access to special programs was "an ongoing action." *Id.* at 34. The Coordinator rejected the filing on the same grounds, again on a form indicating that Ngo could not appeal the decision. *Id.* at 32-33.

B. The Exhaustion Requirement Of The PLRA

The predecessor of the current exhaustion provision contained in 42 U.S.C. § 1997e was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349. Although exhaustion is not generally required in suits under 42 U.S.C. § 1983, CRIPA gave district courts discretion to require exhaustion in § 1983 suits by state prisoners when the administrative remedies satisfied certain federal standards. In

such cases, the court was authorized to stay the federal litigation for a limited period to permit exhaustion. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 511 (1982).

The legislation that became the PLRA was first introduced in 1995, and enacted in 1996 as part of an appropriations bill, H.R. 3019, 104th Cong., tit. VIII (1996). Supporters of the Act argued that it would help to discourage frivolous litigation by inmates, while not "prevent[ing] inmates from raising legitimate claims." 141 Cong. Rec. S14611, S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch). The PLRA amended the CRIPA exhaustion provision by making it mandatory rather than discretionary; eliminating the language requiring minimum federal standards for grievance procedures; and applying it to all suits under federal law by state and federal prisoners, where CRIPA had only been applicable to § 1983 actions by state prisoners. See generally *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

C. Proceedings Below

On July 11, 2001, Ngo filed a complaint in the United States District Court for the Northern District of California under § 1983, seeking injunctive relief and damages and alleging that petitioners' conduct violated his First Amendment rights to free exercise of religion and free speech; denied him due process; and defamed him. J.A. 2-14. Ngo further alleged that he had exhausted all available administrative grievance procedures, noting that he had submitted two appeals that were rejected. *Id.* at 15-19. On motion by petitioners, the District Court granted the defendants' motion to dismiss for failure to exhaust administrative remedies. Pet. App. 25.

The Ninth Circuit reversed, rejecting petitioners' argument that Ngo's allegedly untimely filing amounted to a failure to exhaust under the PLRA. The court reasoned that petitioners' argument "confuses the doctrines of exhaustion

and procedural default," because exhaustion is a timing doctrine that merely "bars a remedy in federal court if one is still available in the state's administrative system," whereas procedural default permanently bars claims that are procedurally barred in the state system. *Id.* at 9. The court concluded that the PLRA contains only an exhaustion requirement, not a procedural default rule.

In doing so, the Ninth Circuit emphasized that nothing in the statute's language "mentions procedural default or indicates an intent to bar suits by prisoners who fail to meet administrative time requirements." *Id.* at 15. The court also cited authority holding that "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach one by a statutory reference to the other." *Id.* at 18-19 (internal quotation marks omitted).

The court further noted that engrafting a procedural default rule onto the PLRA's exhaustion requirement "would effectively shrink to fifteen working days"—the limit imposed by the prison grievance system—the limitations period in § 1983 actions by California prisoners. *Id.* at 20 & n.4. Moreover, allowing procedural defects to bar potentially meritorious claims would give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat" such claims. *Id.* at 21.

The Ninth Circuit rejected an analogy to the procedural default bar recognized in habeas corpus cases, noting that the habeas procedural default rule "has its origins in the adequate and independent state ground doctrine," *id.* at 9, and in the fact that a habeas petition is a collateral attack on a state court judgment that may rest on such a ground. In that context, enforcing state procedural requirements is essential, because "the state criminal process should be the 'main event' rather than a 'tryout on the road' to a dispositive

federal habeas hearing." *Id.* at 14 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). Prisoners' § 1983 suits, in contrast, "do not collaterally attack a prison grievance proceeding," and it is the federal suit, not the grievance proceeding, that is the main event. Pet. App. 14. The court ultimately determined that the PLRA requirement that plaintiffs exhaust prison administrative remedies is more similar to the Title VII and ADEA administrative schemes—where the Supreme Court has declined to "implant[]" a procedural default rule, *see, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988)—than it is to habeas exhaustion. Pet. App. 18-20.

Finally, the Ninth Circuit rejected the policy argument that the absence of a procedural default rule would defeat the exhaustion requirement's purpose of allowing corrections officials to "take 'corrective action . . . [that] might improve prison administration and satisfy the inmate.'" *Id.* at 16 (ellipsis and brackets in original) (quoting *Porter v. Nussle*, 534 U.S. at 524-25). Prisoners are unlikely to intentionally default their grievances, because the grievance process represents "the fastest route to a remedy." Pet. App. 16. And, in any case, "the inmate must still submit his untimely grievance" in order to exhaust, and that submission satisfies the PLRA goal of "allowing prison officials first crack at resolving prisoners' grievances," should they choose to hear the case on the merits. *Id.* at 17.

SUMMARY OF ARGUMENT

The plain text and structure of § 1997e impose a requirement of exhaustion *simpliciter*, which means that a prisoner's administrative remedies must be "exhausted" in the simple sense that they are no longer available. Petitioners contend that § 1997e requires more than exhaustion *simpliciter, i.e.*, procedurally faultless exhaustion, such that the prisoner's grievance is addressed on the merits rather than rejected by prison officials because of procedural

missteps.[1] Where a grievance is rejected on procedural grounds, petitioners contend that § 1997e requires that it be considered procedurally defaulted.

Several aspects of the plain text of § 1997e compel the conclusion that it requires only simple exhaustion. *First*, the statute's use of the temporal word "until" establishes that § 1997e(a) embodies a *timing* requirement, postponing suit *until* administrative remedies are unavailable. The word is not consistent with "merits" exhaustion, under which the question is *not* one of timing; the claim of a prisoner whose grievance is rejected on procedural grounds is not *postponed*; it is forfeited. *Second*, § 1997e(a)'s use of the present tense—asking whether administrative remedies "*are exhausted*" (emphasis added)—requires a focus on whether remedies are *presently* available. This language cannot be squared with petitioners' rule, which requires a backward-looking focus on what remedies *were* available and whether they became unavailable through review on the merits or through procedural errors. *Third*, the failure to expressly require more than simple exhaustion in § 1997e(a) is telling, given that Congress contemporaneously passed another statute that turned on a prisoner's invocation of state remedies, and *did* specify that they had to be invoked "properly," by requiring "a *properly filed* application" for state remedies, 28 U.S.C. § 2244(d)(2) (emphasis added). Congress could easily have added similar language here. Finally, a closely related provision, § 1997e(c)(2)—which gives district courts the option of dismissing certain suits on

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[1] For ease of reference, this brief will sometimes refer to exhaustion *simpliciter* as "simple" exhaustion, and to the position of petitioners as "merits" exhaustion or "procedurally faultless" exhaustion.

the merits "without first requiring the exhaustion of administrative remedies"—makes clear that Congress thought that in typical cases of non-exhaustion the prisoner *could* return to the grievance system to exhaust, and would not procedurally default his claims.

Respondent's interpretation of § 1997e is also compelled by the well-settled interpretation of nearly identical language in the habeas corpus exhaustion statute, 28 U.S.C. § 2254(b), as requiring exhaustion *simpliciter*. The exhaustion requirement under § 2254(b) is a *timing* requirement, and state remedies are "exhausted" whenever there are no such remedies *still* available, even if remedies have become unavailable only because they were procedurally forfeited. *E.g., Gray v. Netherland*, 518 U.S. 152, 161 (1996). Because of the established habeas corpus distinction between exhaustion and procedural default, Congress' decision in the PLRA to require only exhaustion makes clear it meant just that: exhaustion, not procedural default. The United States' attempt to portray habeas exhaustion as requiring procedurally faultless exhaustion is inconsistent with decades of case law and is contradicted by the very cases on which the United States relies. And the administrative exhaustion doctrines the United States cites for the same proposition are inapposite.

Important principles of statutory construction also support respondent's position. In particular, this Court has refused to construe statutes in a fashion that gives state authorities the opportunity to defeat § 1983 claims by controlling limitations periods or other procedural rules. *E.g., Wilson v. Garcia*, 471 U.S. 261, 279 (1985). Here, construing § 1997e as including a procedural default sanction would effectively turn the § 1983 limitations period for prisoners into a matter of days—in a number of states, as few as two or three days. It would also give jail and prison officials the opportunity and incentive to preclude § 1983 suits by straining to reject

prison grievances on procedural grounds. Other statutory construction principles are also applicable: This Court has found forfeiture of claims through procedural errors inappropriate where claimants proceed *pro se*; reading a procedural default rule into § 1997e would operate as an implied partial repeal of § 1983; and Congress' determination that prisoners must exhaust all remedies without regard to their fairness suggests a congressional belief that procedural errors would not result in defaults. Had Congress believed the contrary, its elimination of fairness standards could be explained only by implausibly attributing to it the intent to create an uncommonly harsh rule.

The history of § 1997e also provides no support for petitioners. Petitioners cannot point to even a single statement by any Senator or Representative indicating that he or she intended or expected a procedural default rule. Petitioners and the United States attempt to overcome this resounding silence through a complicated argument that imputes intent to Congress based on an alleged assumption in *McCarthy v. Madigan*, 503 U.S. 140 (1992), that any exhaustion rule would inherently include a procedural default component. However, *McCarthy* made no such assumption, and, in any event, the only reference to *McCarthy* in the legislative history had nothing to do with any purported procedural default rule.

Petitioners' public policy argument that the purposes of the PLRA exhaustion requirement require a procedural default rule is also unavailing. In the absence of affirmative evidence that Congress created such a rule, petitioners' arguments in favor of creating one should be directed to Congress, not this Court. Moreóver, the argument is improperly premised on the notion that Congress' purpose in enacting the PLRA was to reduce inmate litigation at all costs, a portrayal of congressional intent that is oversimplified and inaccurate.

In addition, the overblown claim that interpreting § 1997e as requiring simple exhaustion would make the statute "meaningless" is demonstrably incorrect. The Ninth Circuit did *not* hold that prisoners can satisfy § 1997e merely by passively allowing filing deadlines to pass. Rather, because grievance systems typically allow discretion to excuse late filings, "the inmate must still submit his untimely grievance" in order to exhaust. Pet. App. 17. Accordingly, there are numerous ways the exhaustion requirement is meaningful even without procedural default: At a minimum, the requirement means an aggrieved inmate cannot proceed immediately to court, but rather must wait at least until the end of the filing period; in addition, the inmate cannot go to federal court without at least attempting to submit an untimely claim, and prison officials, if they desire, can address it on the merits, and perhaps satisfy the prisoner or convince him the claim is frivolous; and even if prison officials decline to hear the grievance, the effort of filing the grievance and proceeding through the system may dissuade the prisoner from filing suit.

Moreover, the notion that it is inherently irrational to require exhaustion without procedural default is contradicted by this Court's own case law prior to *Wainwright v. Sykes*, 433 U.S. 72 (1977), as well as by other statutory schemes in which Congress has required invocation of administrative remedies but has not accompanied that with a procedural default sanction.

Finally, petitioners' invitation to this Court to create a judge-made PLRA procedural default doctrine by "analogy" to habeas cannot be accepted. The Court's authority to create doctrines like procedural default in habeas cases stems from its broad equitable discretion in such cases. The Court has no similar discretion here to supplement Congress' statutory scheme. Moreover, even if there were such discretion, the

fundamental bases for the habeas procedural default doctrine are entirely absent here.

ARGUMENT

POINT I

THE PLAIN LANGUAGE AND CONTEXT OF § 1997e REQUIRE SIMPLE EXHAUSTION

A. The Plain Text Of § 1997e(a) And A Related Provision Require Simple Exhaustion

1. The Text Of § 1997e(a) Requires Simple Exhaustion

This statutory interpretation case is governed by the "cardinal canon" that presumes "that a legislature says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and the concomitant recognition that when a provision is *not* fairly contained in statutory language, the Court will not, in pursuit of the alleged policy of the statute, "engraft" it. *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); see also *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (Court will not "read an absent word into the statute"); *Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005) (Court will not "rewrite the statute that Congress has enacted").

Here, the plain text of § 1997e(a) states: "No action shall be brought . . . *until such administrative remedies as are available are exhausted.*" (Emphasis added). The natural reading of this language is that it imposes only a *timing* requirement—postponing suit until no administrative remedies remain—rather than a requirement that the

remedies be rendered unavailable in any particular manner.[2] In particular, Congress' choice of the phrase "[n]o action shall be brought . . . *until*" remedies have been exhausted (instead of saying no action shall be brought "*unless*" remedies have been exhausted) is significant. The use of the temporal word "until," meaning "before the time that," WEBSTER'S THIRD NEW INT'L DICTIONARY 2513 (1993), conveys a timing requirement: it assumes that the question to be answered is simply whether the prisoner can file suit now or must wait until later; if no remedies are available, he can file now, but if remedies *are* available, he cannot file "until" later, when they become unavailable.

By contrast, the meaning of "until" is *not* consistent with a rule requiring "merits" exhaustion (*i.e.*, review on the merits by the grievance system), under which the question is not one of *timing*—whether the plaintiff can file now or must wait until later—but whether he can ever file *at all*. Under that rule, a plaintiff whose grievance is rejected on procedural grounds (due to late filing or any other procedural rule jail or prison officials choose to enforce), has not merely *postponed* his suit "until" some later time; he has permanently lost his opportunity to exhaust that remedy, and forfeits his claim.[3]

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[2] It is important to note that contrary to petitioners' suggestion, a simple exhaustion requirement does *not* mean a prisoner may simply wait for prison filing deadlines to pass and proceed directly to federal court. Even after the deadlines, a prisoner typically "must still submit his untimely grievance" in order to exhaust. Pet. App. 17. See *infra* Point III(C).

[3] To be sure, a postponement rather than a permanent bar is theoretically possible under a "merits" exhaustion regime, if a prisoner-litigant may return to the grievance system for resolution on the merits. In practice, however, the uniformly short deadlines of prison grievance systems,

The United States responds that saying "until" "encompasses the possibility that the time of exhaustion will never arrive." U.S. Br. 13. But the "merits" exhaustion rule the United States advocates is not a rule that exhaustion may "never arrive," which connotes indefinite postponement; it is a rule of forfeiture, under which suit is permanently barred once prison or jail officials reject the grievance on procedural grounds. If Congress contemplated the permanent default of improperly exhausted claims, its choice of a word connoting postponement rather than a permanent rejection is inexplicable.[4]

The simple exhaustion interpretation of § 1997e(a) is also compelled by the statute's use of the present tense—"until such administrative remedies as are available *are exhausted*." (Emphasis added.) This phrasing requires a focus on whether any administrative remedies are *presently* available, and the answer to that question cannot depend on what remedies were previously available, much less how they became unavailable. The language is patently *in*consistent with the position of petitioners and the United States, which requires a backward-looking analysis of "those administrative procedures that an inmate has a right to invoke *before* he has rendered those procedures obsolete by

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see Brief for Amicus Curiae Jerome N. Frank Legal Services Organization of the Yale Law School (hereinafter "Jerome N. Frank Brief"), mean that any grievance filed after a federal claim is dismissed will be untimely.

[4] Notably, the state amici supporting petitioners, do not contest that the use of "until" is inconsistent with a procedural default rule. Instead, they forthrightly contend that the text should be ignored because of "the goals of § 1997e," and should be seen as "too slender a reed" on which to rely in interpreting the statute. Brief of New York, *et al.* ("States Br.") 18 n.8.

defaulting on them," Pet. Br. 14 (emphasis in original), and *how* they became unavailable.

Finally, what § 1997e(a) *fails* to say is highly significant. The text does not say that remedies must be "properly" exhausted by filing timely and procedurally compliant grievances; it does not say a prisoner must "exhaust by actually using all remedies that were at any point available"; and it nowhere mentions the concept of procedural default.

This omission of language limiting or modifying the word "exhausted" is particularly telling in light of how Congress dealt with a nearly identical issue in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which was signed into law just two days before the PLRA. In the AEDPA, addressing a tolling provision that, like PLRA exhaustion, turns on a prisoner's invocation of state remedies, Congress specifically limited the provision to "[t]he time during which a *properly filed* application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). Congress' failure to include similar language in § 1997e strongly suggests that it intended no similar limitation to "proper" or procedurally faultless invocation of state remedies.

2. § 1997e(c)(2) Confirms That Congress Required Simple Exhaustion And Did Not Contemplate Procedural Defaults

In addition to the text of § 1997e(a) itself, a closely related provision, § 1997e(c)(2), expresses Congress' understanding that inmates who failed to exhaust would *not* forfeit their claims, but rather would routinely return to the prison grievance system to exhaust any remaining remedies, even though such filings would inevitably be untimely.

Section 1997e(c)(2) gives district courts the authority to dismiss on the merits, "without first requiring the exhaustion of administrative remedies," certain claims that are both

unexhausted and meritless. The necessary premise of this provision is that dismissing on the merits without first requiring exhaustion will save courts time and resources. Dismissing on the merits under this provision, however, will save time and resources only if in the typical case (1) dismissal for non-exhaustion permits an inmate to return to the prison grievance system to exhaust his remedies, even if his grievance will be untimely, and (2) the inmate may then return to federal court. If procedural missteps result in a *forfeiture* of the inmate's claim that cannot be cured by returning to the grievance system, there would be no advantage in dismissing on the merits rather than requiring exhaustion—in either case, the suit could be definitively dismissed immediately.

Indeed, it is impossible to see what "first requiring the exhaustion of administrative remedies" can mean, unless an inmate typically can still exhaust by returning to the prison grievance system at any time. If missing a prison filing deadline constitutes failure to exhaust, the concept of a court "first requiring exhaustion" would make little sense. A prisoner whose grievance is rejected for untimeliness can hardly return to the grievance system and make the grievance timely.

In theory, petitioners could argue that Congress intended § 1997e(c)(2) to apply to a sub-category of cases in which a prisoner-litigant has not filed a grievance but can still return to the grievance system without violating timeliness requirements or other rules. Such a category, however, would be an imaginary one, given the uniformly short filing deadlines that prevail in grievance systems; any grievance would almost certainly be time-barred. See U.S. Br. 29 (most allow "14 to 30 days"); see generally Jerome N. Frank Brief (listing numerous even shorter deadlines).

B. Petitioners' Interpretation Is Unsupported By Any Textual Argument And Requires Supplementing The Language Of The Statute

Both petitioners and the United States claim to rely on the text of § 1997e, but they cannot even agree on what language purportedly embodies their proposed procedural default rule. Petitioners purport to rely on the word "available," but base their reading on the claim that the exhaustion requirement would be "superfluous" without procedural default. Pet. Br. 14-15. This claim is both incorrect, see *infra* Point II(B), and *not* based on a reading of the text. The United States makes no plain language argument at all, tying its argument to the statutory language solely by means of the contention that the word "exhausted" allegedly has a specialized meaning, borrowed from other contexts, that connotes exhaustion on the merits. U.S. Br. 9-13.

In reality, the fundamental argument of each is not a textual one. Rather, they argue that, independent of the text, Congress must have silently *meant* to include a procedural default sanction, because the PLRA's purposes allegedly require it. Locating any such rule in the language of the statute, however, impermissibly requires reading additional words into the statutory text. Petitioners read the phrase "such remedies as are available" as "such remedies as were initially available," Pet. Br. 14-15, and even state plainly at one point that what they seek is "the reading of a procedural-default bar *into* § 1997e(a)." *Id.* at 26 (emphasis added). And the United States overtly argues that the statute should be read as if it included the word "properly" before the word "exhausted." U.S. Br. 9-10.

Adding words to the statutory language, however, is precisely what this Court has said it cannot do, because such supplementation of the text "would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'" *Lamie*, 540 U.S. at 538 (quoting *Iselin v.*

United States, 270 U.S. 245, 251 (1926)) (alteration in original); see also *United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("No mere omission . . . which it may seem wise to have specifically provided for, justif[ies] any judicial addition to the language of the statute.").

In short, there is no plain language argument in support of a procedural default or "exhaustion on the merits" rule, and no argument that does not rely upon impermissibly supplementing the statutory text.

C. Nearly Identical Language In The Habeas Corpus Statute Has Been Definitively Interpreted As Requiring Only Simple Exhaustion

The established meaning of the term "exhausted" in prisoner litigation under the habeas corpus statute, 28 U.S.C. § 2254(b)(1)—and the fundamental distinction between exhaustion and procedural default in habeas proceedings—also compels reading § 1997e as requiring only simple exhaustion. Because of the established distinction between exhaustion and procedural default, it is clear that when Congress expressly included an exhaustion requirement in the PLRA, but opted not to create an accompanying procedural default provision, it meant just that—exhaustion, not procedural default. See *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents.").

Both petitioners and the United States recognize that the operative language of the PLRA "is essentially identical to" the language of the habeas corpus exhaustion requirement,[5] U.S. Br.

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[5] 28 U.S.C. § 2254(b)(1)(A) states, in pertinent part, that a State prisoner's habeas application "shall not be granted unless it appears that . . .

13; see Pet. Br. 26, and it is well-established that exhaustion under § 2254(b) does *not* require that remedies be exhausted through review on the merits. To the contrary, under § 2254(b), state remedies are "exhausted" whenever there are no such remedies *still* available, even if remedies have become unavailable only because they were procedurally forfeited. See, *e.g.*, *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (claims are unexhausted only when there are state "remedies available at the time of the federal petition") (internal quotation marks omitted); *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982) (where state remedies unavailable because claim was not raised on direct appeal, habeas petitioners "have exhausted their state remedies with respect to th[at] claim"). The exhaustion requirement, in short, is a *timing* requirement that prevents federal court intervention until there are no longer any state court remedies remaining.[6] So long as such remedies are unavailable, it is irrelevant, for exhaustion purposes, *how* they became unavailable.

To be sure, the unavailability of a claim through failure to raise it properly in state court is not without consequences in habeas; at least since *Wainwright v. Sykes*, 433 U.S. 72 (1977), such forfeited claims, though "exhausted" under § 2254(b), have in most cases been barred from federal court by the doctrine of

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the applicant has exhausted the remedies available in the courts of the State." Notably, to the extent there are differences between the two statutes they favor respondent's position here: § 2254 imposes a requirement of simple exhaustion even with the word "unless" rather than "until," and without § 1997e's present-tense phrase "are exhausted."

[6] In fact, the exhaustion doctrine now codified in 28 U.S.C. § 2254 originated in a case in which the habeas applicant sought to have the federal courts intervene even before his state criminal trial occurred. *Ex parte Royall*, 117 U.S. 241 (1886).

procedural default. That doctrine, however, is a judge-made equitable rule that is entirely distinct from § 2254(b)'s exhaustion requirement.[7] See *id.* at 80-81 & n.7. Indeed, this Court has consistently held that when a claim has been procedurally forfeited (and remedies thereby rendered unavailable), it necessarily *is* exhausted under § 2254(b). See, *e.g.*, *Gray*, 518 U.S. at 161 (claim is exhausted "'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law.'") (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)) (alteration in original).

This Court has specifically rejected the argument that the language of § 2254(b)—which, again, is nearly identical to the language of § 1997e(a)—can be read to bar, as unexhausted, claims that were procedurally forfeited in state court. In *Fay v. Noia*, 372 U.S. 391 (1963) ("*Noia*"), the Court expressly rebuffed the "contention that 28 U.S.C. § 2254 embodies a doctrine of forfeitures and cuts off relief when there has been a failure to exhaust state remedies no longer available at the time habeas is sought," finding it "refuted by the language of the statute and its history." *Id.* at 434. The Court further noted that the contention it rejected was "in the teeth of the language of § 2254," and held that the statute applies only "to failure to exhaust state remedies *still open* to the habeas applicant at the time he files his application in federal court." *Id.* at 435 (emphasis added).

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[7] Indeed, prior to *Sykes*, the exhaustion requirement was *not* accompanied by a rule barring claims forfeited in state court. Under the regime of *Fay v. Noia*, 372 U.S. 391 (1963), the petitioner's forfeiture of his claims in state court exhausted his remedies, but a habeas petition was not barred by the doctrine of procedural default unless the petitioner had "deliberately bypassed" state remedies. *Id.* at 438.

Although *Noia*'s best-known holding (limiting the procedural default doctrine to cases of "deliberate bypass") has been overruled, see, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *Noia*'s interpretation of § 2254(b)—that a state remedy no longer available because it was forfeited *is* "exhausted"—continues to be the law. Indeed, even *Coleman*, which formally overruled *Noia*'s procedural default holding, continued to make clear that "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Id.* at 732. Numerous other cases are to the same effect. See *Gray*, 518 U.S. at 161-62; *Isaac*, 456 U.S. at 125-26 n.28; *Castille*, 489 U.S. at 351 (claims are exhausted "if it is clear that [they] are now procedurally barred under Pennsylvania law"); *Teague v. Lane*, 489 U.S. 288, 298 (1989) (where "[i]t is clear that collateral relief would be unavailable to petitioner. . . . [he] has exhausted his state remedies under 28 U.S.C. § 2254(b)").

In short, it is firmly established that § 2254(b)'s requirement that a habeas applicant have "exhausted the remedies available" in state court does not require "merits" exhaustion. Rather, it requires only exhaustion *simpliciter*: *i.e.*, that there are no longer any state remedies available, for whatever reason. Thus, a remedy that becomes unavailable through a procedural forfeiture in state court has still been "exhausted" under § 2254(b). Because of this well-established distinction between exhaustion and procedural default, it is clear that when Congress enacted the nearly-identically-worded PLRA and required only exhaustion, it intended the requirement to mean just that: exhaustion, not procedural default. See, *e.g.*, *Cent. Va. Comm. Coll. v. Katz*, No. 04-885, slip op. at 4 n.3 (Jan. 23, 2006) (noting the "presumption that Congress was thoroughly familiar with contemporary law when it enacted" statute) (internal quotation marks omitted); *Wells*, 519 U.S. at 495.

Nonetheless, in the face of this well-settled meaning of "exhausted the remedies available" under § 2254(b), the United

States persists in claiming that the phrase *does* require procedurally faultless exhaustion, relying on three cases purportedly establishing that there has been "a 'merger of exhaustion with procedural default,'" such that a procedurally defaulted claim is considered unexhausted under § 2254(b). U.S. Br. 9-10, 12-13 (quoting Pet. App. 14, and citing *Edwards v. Carpenter*, 529 U.S. 446 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); and *Coleman v. Thompson*, 501 U.S. 722)). However, although each of the cases emphasizes the value of the procedural default doctrine as an *adjunct* to the habeas exhaustion requirement—*e.g.*, *O'Sullivan*, 526 U.S. at 848 (doctrine "protect[s] the integrity of the federal exhaustion rule") (internal quotation marks omitted); *Carpenter*, 529 U.S. at 452 (referring to "inseparability" of the two)—they do nothing to question the clear distinction between the doctrines, or to change the long-standing rule that remedies are "exhausted" whenever they are unavailable.

As an initial matter, two of the three cases on which the United States relies *post-date* the enactment of the PLRA by at least three years, and therefore any new meaning they purportedly gave to the term "exhausted" cannot have been incorporated by Congress into the PLRA. See, *e.g.*, *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991) (cases decided "well after the enactment of" the statute at issue not relevant to interpretation of phrase in the statute). And the third, *Coleman*, offers nothing to support any "merger" of exhaustion and procedural default.

More fundamentally, the United States misconceives the division of labor between exhaustion and procedural default in these cases. In particular, the fact that these cases deem the procedural default doctrine an important judicially-created *adjunct* to the

exhaustion requirement does not make procedural default a *part* of the exhaustion requirement, or change that requirement into an obligation to exhaust claims through review on the merits.[8] Indeed, the cases demonstrate exactly the opposite: that § 2254(b) continues to require only simple exhaustion, and that the question whether a petitioner complied with state procedures is only relevant to the separate doctrine of procedural default. *None* of the cases says that procedurally defaulted claims are not "exhausted"; to the contrary, the cases continue to make clear that procedurally defaulted claims necessarily *are* exhausted.[9]

In short, the distinction between exhaustion and procedural default continues to be straightforward and clear. As described by the leading federal courts treatise:

> [A] procedural default involves a failure to pursue opportunities to litigate in state court that once were but no longer are available. A failure

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[8] Notably, the state amici admit that "[i]t is true that the federal habeas exhaustion requirement, taken alone, mandates only that a petitioner have no remaining state remedies 'available' when a habeas petition is filed." States Br. 18.

[9] See *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion . . . ."); *O'Sullivan*, 526 U.S. at 848 (distinguishing between "whether a prisoner has exhausted his state remedies" and "whether he has *properly* exhausted" them, and terming failure to do the latter "procedural[] default[]," not a failure to exhaust); *id.* ("We do not disagree" with dissent's detailed elaboration of the distinction between doctrines of exhaustion and procedural default); *Edwards*, 529 U.S. at 453 (prisoner whose claim is not addressed by state courts because procedurally defective "would have 'concededly exhausted his state remedies'") (quoting *O'Sullivan*, 526 U.S. at 854 (Stevens, J., dissenting)).

> to exhaust state remedies, by contrast, involves a failure to resort to opportunities to litigate in state court that *remain* available.

R. FALLON, D. MELTZER, AND D. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1300 (5th ed. 2003) (emphasis in original). Accordingly, when a claim is forfeited in state court and can no longer be asserted there, "there is no question" that the exhaustion requirement is satisfied. *Id.* at 1359.

The cases cited by the United States thus do nothing to shake the well-settled meaning of "exhausted" under § 2254(b) as requiring only that state remedies be unavailable—a meaning of which Congress was presumptively aware when it chose nearly identical language for the PLRA, see, *e.g.*, *Wells*, 519 U.S. at 495. At most, the cases might be cited to support a policy argument in favor of creating a *judge-made* procedural default doctrine as a *supplement* to what the PLRA itself requires, if this Court were free to create one.[10] But for purposes of interpreting what is required by the *text* of the PLRA, the cases merely reaffirm that the term "exhausted" refers only to the present unavailability of remedies, not to any requirement of "merits" exhaustion.

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[10] As discussed in Point IV, *infra*, however, that policy argument is not a successful one: the courts' freedom to craft a procedural default doctrine in habeas derives from an equitable discretion unique to habeas that is not present here. Moreover, the reasons for creating that doctrine, which rest heavily on an analogy to the independent and adequate state ground doctrine, are inapplicable here.

D. The Administrative Exhaustion Cases On Which The United States Relies Do Not Import Any Different Meaning Of "Exhausted" Into § 1997e

The United States also seeks to import into § 1997e, from administrative exhaustion cases, a definition of "exhausted"—as meaning exhausted without procedural flaws—that is purportedly established in such cases. U.S. Br. 10-12. This contention, too, fails, for multiple reasons.[11]

First, such a definition would be inconsistent with the plain text of § 1997e. As discussed earlier, the plain language of § 1997e(a), the statute's focus on the present tense, its failure to express any limitation on the word "exhausted," and § 1997e(c)(2)'s indication that claims will *not* be defaulted, are all inconsistent with an understanding of the PLRA that defines "exhaustion" as procedurally faultless exhaustion. See *supra* Point I(A).

In addition, there are numerous reasons why the definition of "exhausted" in § 1997e is identical to its meaning in habeas exhaustion rather than to what the United States claims is a settled meaning in administrative exhaustion. *First*, the PLRA's exhaustion language "is essentially identical to" the language of the habeas corpus exhaustion

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[11] It is worth noting at the outset that the effort to import administrative exhaustion concepts into § 1997e represents an about-face for the United States. In *Booth v. Churner*, 532 U.S. 731 (2001), the United States opposed importing administrative exhaustion's "futility" exception into § 1997e, arguing that Congress in the PLRA "clearly demonstrate[d] that it did not wish to incorporate traditional [administrative] exhaustion principles." Brief for United States at 16, *Booth v. Churner*, 532 U.S. 731 (2001) (No. 99-1964).

statute, U.S. Br. 13, and the United States cites no statute addressing administrative exhaustion that has such similar language.

Second, as discussed in the Brief for Amici Curiae Law Professors, administrative exhaustion cases requiring "proper" presentation to the agency follow not from an established meaning of "exhaustion," but from an ordinary waiver principle that applies when an agency is the primary adjudicator or decisionmaker, and the court proceeding is merely a *review* of that decision. The agency cannot be the primary decisionmaker (and the court cannot review its decision) if a claim or argument is not presented to the agency. Indeed, the United States recognizes that this waiver concept is at the heart of administrative exhaustion requirements. See U.S. Br. 10-11 (administrative exhaustion cases apply a "waiver principle"); see also *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000) ("The basis for a judicially-imposed issue-exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.").

By contrast, in a § 1983 or *Bivens* claim, the jail or prison grievance system is in no sense a primary decisionmaker. As the United States recognizes, the federal suit proceeds *de novo*. U.S. Br. 14 n.6. Accordingly, the waiver rationale is not implicated, because no administrative decision is being *reviewed*. Likewise, the related concern with "toppl[ing] over administrative decisions" on the basis of a claim or argument not presented to the agency, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), cannot apply when no administrative decision is being reviewed, let alone "toppled over." See *McCarthy v. Bronson*, 500 U.S. at 142 ("[T]he fact that Congress may have used the [same] term . . . in a different sense in legislation having a different purpose cannot control our interpretation of the language in this Act that so clearly parallels our [prior] opinion.").

In this respect, too, the PLRA context is more like the habeas context, because in habeas the court, at least technically, "does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*." *Coleman*, 501 U.S. at 730.[12]

Notably, in cases where Congress has required litigants to resort first to administrative procedures but the agency is not given decisionmaking authority—*i.e.*, where the subsequent federal suit is *de novo* rather than a review of an administrative decision—this Court has held that the statutes did *not* require compliance with state timeliness requirements. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988).[13]

Third, there is an inherent relationship between habeas cases and prisoner suits subject to the PLRA, both of which "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994); see also *id.* at 481 ("potential overlap" between the two); *McCarthy v. Bronson*, 500 U.S. at 140 (habeas and § 1983 are "the two

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[12] Of course, because the habeas petitioner "is in custody *pursuant* to a judgment," *id.* (emphasis in original), a habeas petition functions *like* an attack on a judgment, and the procedural default doctrine is based on this parallel. See *infra* Point IV. No similar analogy applies in PLRA cases, as the suit is in no sense a review of any prior decision. See *id.*

[13] The Title VII requirement of timely filing with the EEOC might be thought a counter-example, but in fact that requirement is based on express statutory language requiring that charges "shall be filed" within specific time limits. 42 U.S.C. § 2000e-5(e)(1).

primary categories of suits brought by prisoners"); 28 U.S.C. § 636(b)(1)(B) (applying same rule to both types of prisoner cases with respect to referral to magistrates).

Indeed, the PLRA was developed at the same time as the AEDPA, and one of the earliest versions of the PLRA exhaustion requirement was in section 103 of the proposed Violent Crime Control and Law Enforcement Improvement Act of 1995 (S. 3), which also included changes to habeas exhaustion (see section 508) that eventually became part of the AEDPA. It is unlikely that these two references to exhaustion in the same bill were intended to incorporate different definitions of exhaustion.

Fourth, the predecessor to the PLRA exhaustion requirement was the discretionary exhaustion requirement of CRIPA. The concept of exhaustion embodied in CRIPA was a habeas-style timing requirement that permitted prisoners to cure non-exhaustion, not a default-inducing requirement of procedurally faultless exhaustion. See generally Brief of American Civil Liberties Union, *et al.* (detailing timing focus of CRIPA). Indeed, under CRIPA, a district court could not even dismiss a case without prejudice on exhaustion grounds. See, *e.g.*, *Patsy v. Bd. of Regents*, 457 U.S. 496, 511 (1982). Although the PLRA broadened CRIPA's exhaustion requirement and made it mandatory rather than discretionary, there is no suggestion that the PLRA abandoned the concept of exhaustion as a habeas-like timing requirement.

In any event, even if it were an appropriate analogy, "administrative exhaustion" is not a monolithic doctrine applying a single exhaustion requirement or definition of "exhausted": rather, the application of the doctrine varies with the particular statutory language and scheme at issue. See, *e.g.*, *McKart v. United States*, 395 U.S. 185, 195 (1969) ("In Selective Service cases, exhaustion must be tailored to

fit the peculiarities of the administrative system Congress has created."); *McCarthy v. Madigan*, 503 U.S. at 144 ("Of 'paramount importance' to any exhaustion inquiry is congressional intent.") (quoting *Patsy*, 457 U.S. at 501). Accordingly, the doctrine does *not* ineluctably require forfeiture of claims that do not satisfy all timely filing and procedural requirements, particularly where, as here, the waiver principle is inapplicable because no agency decision is being reviewed. See *Oscar Mayer*, 441 U.S. at 759 (requirement to commence state agency proceedings before filing with EEOC did not require *timely* commencement); *Commercial Office Prods. Co.*, 486 U.S. at 124 (same).[14]

Nor can the United States cite any case in which this Court has held that a "merits" exhaustion requirement automatically follows from a statute's use of the word "exhaust" or its variants. The two statutes it cites, 45 U.S.C. § 355(f) (Railroad Retirement Board), and 8 U.S.C. §1252(d)(1) (appeal of order of removal), fit within the "review" paradigm, where what the United States calls the "waiver principle," U.S. Br. 11, applies without regard to whether the statute uses the word "exhausted." Indeed, even the Court of Appeals authority cited by the United States

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[14] To be sure, the statutes at issue in these two cases did not use the word "exhaustion." However, administrative exhaustion requirements often stem from the use of words other than exhaustion. See, *e.g.*, *Apfel*, 530 U.S. at 106-07 (Social Security Act exhaustion rule stems from statutory phrase "final decision"). What was actually at issue in those cases—giving "state agencies a limited [and non-binding] opportunity to resolve problems . . . and thereby to make unnecessary, resort to federal relief," *Oscar Mayer*, 441 U.S. at 755—is far more similar to what § 1997e does than are exhaustion requirements that give binding decisionmaking authority to the administrative agency.

does not purport to be deriving a requirement of what the United States calls "proper" exhaustion from the word "exhausted," as opposed to the waiver principle or other statutory language.[15]

In sum, there is no basis for importing a "merits" exhaustion requirement from administrative exhaustion cases.

E. Important Principles Of Construction Require Interpreting § 1997e As Requiring Simple Exhaustion

1. § 1997e Cannot Be Construed To Give State Authorities The Ability To Defeat Federal Claims By Manipulating Procedural Rules

Reading an unwritten procedural default rule into § 1997e would be particularly inappropriate in light of this Court's long-standing principle that statutes should not be construed to give state authorities the ability to defeat federal civil rights claims by controlling statutes of limitations or procedural rules.

In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court determined that state personal injury limitations periods should be borrowed for § 1983 claims in significant part because selecting a less broadly-applicable period might lead to the period being "fixed [by states] in a way that would discriminate against federal claims, or be inconsistent with federal law." *Id.* at 279. By contrast, the states would be unlikely to manipulate a period applicable to all personal injury suits. *Id.*

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[15] For example, 45 U.S.C. § 355(f) requires that remedies will "have been *availed of* and exhausted," *and* requires that the decision to be reviewed be a "final decision." (Emphasis added).

Similarly, in *Felder v. Casey*, 487 U.S. 131 (1988), the Court reiterated *Wilson*'s concern about giving states the ability to defeat § 1983 claims by controlling procedure, holding that a state could not apply a statute requiring notice within 120 days of the injury in any suit against a governmental entity or officer. *Id.* at 138. The Court objected to the brief "4-month window" given to claimants, and found that because the requirement applied only to "persons who wish to sue governmental defendants," it "discriminate[d] in a manner detrimental to the federal right." *Id.* at 146; see also, *e.g.*, *Burnett v. Grattan*, 468 U.S. 42, 50 (1984) (refusal to apply limitations periods too short to "take into account [the] practicalities that are involved in litigating federal civil rights claims"); cf. *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (a "construction of [§ 1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise") (internal quotation marks omitted).

In the present case, these concerns apply *a fortiori*. If an untimely grievance defaults a prisoner's federal claim, the grievance system's filing deadline—almost always substantially shorter than the "4-month window" this Court disapproved in *Felder*—effectively becomes a statute of limitations for the prisoner's federal claim. As the court below noted, this would have changed the limitations period applicable to respondent's claim from two years to 15 working days. Pet. App. 20 n.4. In numerous other states, the period would be shorter than one week, and in several the prisoner would be required to take action in as little as two or three days. See Jerome N. Frank Brief, App. at 1-5.[16]

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[16] Cf. *Oscar Mayer*, 441 U.S. at 762 ("Congress could not have intended to consign federal lawsuits to the vagaries of diverse state limitations statutes, particularly since, in many States . . . the limitations peri-

Moreover, here, as in *Felder*, the filing deadlines apply specifically to cases against state officials and entities. And the potential for abuse is much greater here, because the deadlines and other procedural rules apply only to an unpopular and politically powerless group, not citizens at large; jail and prison officials have a strong incentive to reduce inmate litigation by setting unfair deadlines and procedural traps for the unwary litigant (see Pet. App. 21). Further, the rules are interpreted and applied, not by impartial state judges, but by jail and prison officials who may be motivated to protect themselves, co-workers, supervisors, or their institutions from potential liability by rejecting claims on procedural grounds, and who are subject to no realistic check on the fairness of their decisions.

The United States contends that this "concern has not been shown to be justified," because "[m]ost jurisdictions" allow the filing of claims within 14 to 30 days of the action being challenged," and because there allegedly has been no showing that prison administrators impose onerous procedural obstacles. U.S. Br. 29-30. This argument, however, misses the point. Under *Wilson* and *Felder*, this Court has construed statutes to avoid giving state officials the *opportunity* to use procedural requirements to defeat federal civil rights claims, and certainly has not required a showing that particular states have already taken advantage of the opportunity. See, *e.g.*, *Wilson*, 471 U.S. at 279.[17]

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ods are considerably shorter than the 180-day period allowed grievants in nondeferral States.") (internal citation and quotation marks omitted).

[17] Moreover, the 14 to 30 day deadlines which the United States notes actually undermine the point: even those deadlines are far shorter than the four months found intolerable in *Felder*, and there are many other states with deadlines as short as two, three, or five days that cannot be used to trigger procedural defaults without defeating § 1983's purpose of

In addition, the assertion that officials have made no effort to eliminate prisoner claims on procedural grounds is simply inaccurate. This case itself arguably provides an example. Respondent's grievance challenged ongoing restrictions on his activities, yet the prison grievance coordinator rejected respondent's appeal on the ground that it should have been raised earlier. *Id.* at 33. Under normal principles, "the continuing nature" of such a claim would mean that the "limitations period would be triggered anew by ongoing conduct." *McCarthy v. Madigan*, 503 U.S. at 153 n.5. Here, however, respondent was not even able to appeal the untimeliness determination, because the determination meant that his appeal would not even be accepted for filing.

A particularly striking example can be found following *Strong v. David*, 297 F.3d 646 (7th Cir. 2002), which rejected the argument that a plaintiff's grievance was insufficiently specific, but said the court would enforce "factual detail" requirements if they were promulgated. Surely enough, the Illinois Department of Corrections less than six months later proposed strict new regulations that required "factual details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint." Ill. Admin. Code tit. 20, § 504.810(b) (2006); see 26 Ill. Reg. 18065, 2002 WL 31898262, at § 504.810(b) (Dec. 27, 2002) (proposing amendment). It is hard to understand these regulations—which were apparently deemed unnecessary before the Seventh Circuit began enforcing procedural defaults—other than as a response to the opportunity to torpedo prisoner claims on procedural grounds.

"ensur[ing] that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett*, 468 U.S. at 55.

In short, a procedural default rule would create powerful incentives to find ways to dismiss grievances on procedural grounds—and thereby bar federal suits—rather than address them on the merits and leave prisoners free to continue to federal court.[18] And *Wilson* and *Felder* establish that this Court traditionally has presumed that such a result is not what Congress can have intended.

2. Multiple Other Principles Of Statutory Construction Require The Same Result

The procedural default rule petitioners advocate also runs afoul of numerous other principles of construction.

1. This Court has long held that allowing claims to be forfeited through procedural errors is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972); see also, *e.g.*, *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (construing statute to ensure that "the lay complainant . . . will not risk forfeiting his rights inadvertently"); *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (construing statute to comport with "our admonition that the complete exhaustion rule is not to 'trap the unwary pro se prisoner'") (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)); *Mohasco Corp. v.*

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[18] For example, in *Riccardo v. Rausch*, 375 F.3d 521, 526 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 1589 (2005), officials exercised their discretion to review an untimely failure-to-protect grievance in a rape case that resulted in a jury verdict of $1.5 million (later reversed on appeal). Under petitioners' rule, prison officials will have strong incentives to reject such grievances on timeliness grounds, and thereby eliminate any risk of such a verdict.

Silver, 447 U.S. 807, 816 n.19 (1980) (court should not "read in a time limitation provision that Congress has not seen fit to include" in statutory scheme in which "laymen . . . initiate the process.") (internal quotation marks omitted).

Here, the claimants are not only laymen, but are also, on average, particularly poorly educated and lacking in literacy skills. See Jerome N. Frank Brief. Some of the affected claimants are even juveniles. See, *e.g.*, *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind. July 27, 2005). Requiring forfeiture when these individuals inevitably run afoul of procedural rules would clash with the presumption that Congress does not intend to induce forfeitures by such *pro se* litigants.

2. The reluctance to induce forfeitures by *pro se* litigants is particularly applicable here, as "[t]he right to file for legal redress in the courts" is "more valuable" for a prisoner, because, having been "divested of the franchise, the right to file a court action stands, in the words of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as his most 'fundamental political right, because preservative of all rights.'" *Hudson v. McMillian*, 503 U.S. 1, 15 (1992); see also *Turner v. Safley*, 482 U.S. 78, 84 (1987) (courts "must take cognizance of the valid constitutional claims of prison inmates").

3. The question whether to read a procedural default rule into § 1997e also implicates the principle that "absent a clearly expressed congressional intention, repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks and citation omitted). In *Patsy v. Bd. of Regents*, the Court observed that a § 1983 exhaustion requirement, if it led plaintiffs to run afoul of limitations periods and lose their claims, "might result in the effective repeal of § 1983." 457 U.S. at 514 n.17. Here, the extensive forfeitures that would result from a procedural default rule would produce at least a partial "effective

repeal" of § 1983, *United States v. Vonn*, 535 U.S. 55, 65 (2002) (implied "partial repeal" is "disfavored"), with no "clearly expressed congressional intention," *Branch v. Smith*, 538 U.S. at 273, to impose a forfeiture rule.

4. Reading a procedural default rule into § 1997e would also implausibly attribute to Congress an intention to create an exhaustion rule of uncommon harshness. CRIPA recognized the unfairness in many prison grievance systems by giving courts discretion over exhaustion, and by limiting any required exhaustion to "plain, speedy, and effective" remedies that met "minimum acceptable standards" of fairness and effectiveness. In § 1997e, Congress deliberately eliminated these protections, requiring exhaustion unconditionally. In addition, as this Court held in *Booth*, in doing so Congress eliminated the "futility" exception generally recognized in administrative law. 532 U.S. at 739-41.

This deliberate inattention to whether a grievance system meets even minimal standards of fairness is far more consistent with an intent to require simple exhaustion than with an intent to default claims that run afoul of grievance system rules. Had Congress intended the consequence of a procedural missteps to be elimination of the inmate's claims, it necessarily would have been concerned with the fairness and adequacy of the procedures that could lead to such non-merits forfeitures. Its apparent lack of concern bespeaks an understanding that such forfeitures were not contemplated.

POINT II

THE LEGISLATIVE HISTORY OF THE PLRA PROVIDES NO SUPPORT FOR REQUIRING ANYTHING MORE THAN SIMPLE EXHAUSTION

Petitioners cannot point to even a single statement in the legislative history of the PLRA indicating that any Senator or

Representative intended or expected a rule of procedural default. This striking congressional silence is particularly noteworthy because several legislators addressed how the exhaustion requirement could reduce the frequency of inmate suits,[19] yet they all failed to include the winnowing of suits through procedural default—despite the fact that such a rule would inevitably bar many claims that would otherwise be litigated in federal court. Although data on prisoner grievances are scarce, the frequency with which grievances are rejected on procedural grounds is necessarily high, given the extraordinarily short grievance system limitations periods and the fact that poorly-educated prisoners often must navigate complex systems without counsel. Cf. *Felder*, 487 U.S. at 152 ("Civil rights victims often . . . will fail to file a notice of injury or claim within . . . four months").[20]

Indeed, even in the habeas context—in which prisoners are represented by counsel for at least part of the state process, and filing deadlines are not normally as draconian—

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[19] Representative LoBiondo, for example, stated that the exhaustion requirement would create an "opportunity for early resolution of the claim" in the administrative process, 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995), and also argued that the exhaustion requirement "would aid in deterring frivolous claims; by raising the cost in time/money terms." H.R. Rep. No. 104-2468, § 2 (1995); see also 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl); 141 Cong. Rec. S18127-03, S18137 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch).

[20] Congress was well aware that jail and prison grievance systems are often unfair or inadequate—in recognition of which CRIPA allowed exhaustion only in systems meeting "minimum acceptable standards"—and expressly made the PLRA exhaustion requirement applicable to all grievance systems, regardless of their fairness. See *Booth*, 532 U.S. 740 n.5.

a Justice Department study roughly contemporaneous with the PLRA found that "*63%* of all habeas petitions are dismissed, and *57% of those are dismissed for failure to exhaust state remedies*." *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J. dissenting) (emphasis added) (reporting study by Bureau of Justice Statistics). If Congress intended or contemplated procedural defaults, the failure to mention such forfeitures as a likely source of caseload reductions is hard to explain.

Indeed, to the extent the legislative history speaks to the issue at all, it suggests that supporters of the bill did *not* contemplate forfeitures, in that they asserted the belief that the PLRA would in no way interfere with the assertion of legitimate claims. See 141 Cong. Rec. S14611, S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); see also 142 Cong. Rec. S2219-03, S2226 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) ("If somebody has a good case, a prisoner, let him file it."); 141 Cong. Rec. S14611-01, S14628 (daily ed. Sept. 29, 1995) (statement of Sen. Thurmond) (bill will still "allow meritorious claims to be filed").

In addition, a desire to discourage inmate lawsuits without unfairly barring claims is manifest in the various other provisions aimed at dampening prisoner litigation, such as requiring payment of court filing fees by indigent prisoners, 28 U.S.C. § 1915(b)(1)-(2); loss of *in forma pauperis* status for inmates with three meritless claims or appeals, *id.* § 1915(g); judicial screening and dismissal of frivolous

claims at the threshold, *id.* § 1915A(b)(1)-(2); and limiting attorneys' fees, 42 U.S.C. § 1997e(d). These provisions bespeak an effort to reduce claims by making litigation more difficult and costly, rather than by barring claims from court.[21] *None* of these provisions seeks forfeitures.

Petitioners and the United States attempt to remedy the complete absence of legislative history evidence for a procedural default rule by attempting to incorporate *McCarthy v. Madigan* into that history. Under their reasoning, (1) *McCarthy* allegedly assumed that an exhaustion requirement, if the Court adopted one, would necessarily require procedural default of claims rejected officials on procedural grounds; (2) Congress believed this Court erred in *McCarthy* in not requiring exhaustion; (3) ergo, Congress, in departing from *McCarthy* by requiring exhaustion, must also have intended to impose a procedural default sanction. U.S. Br. 18-20; Pet. Br. 16 & n.2.

There are numerous holes in the argument, even if one leaves aside that no legislator actually said anything of the sort. First, *McCarthy*, contrary to the United States' contention, did *not* "assume[] that a general exhaustion requirement ... would incorporate a procedural-default rule." (U.S. Br. 19). *McCarthy* made clear that it was merely addressing the particular rule pressed by the respondent in

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[21] See, *e.g.*, 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("This provision [requiring payment of court costs], like the filing fee provision, will ensure that inmates evaluate the merits of their claim."); 141 Cong. Rec. S18127-05, S18137 (daily ed. Dec. 7, 1995) (statement of Sen. Hatch) ("They will have to pay something to file these charges, and that stops a lot of the frivolous cases right there.").

that case, which included a procedural default component—referring to it as "the rule of exhaustion *proposed* here," 503 U.S. at 150 (emphasis added). *Nothing* in *McCarthy* says that an exhaustion requirement inherently includes procedural default.

In addition, there is no evidence that Congress disagreed with anything except *McCarthy*'s basic holding requiring no exhaustion *at all*. The United States points to the removal of CRIPA's phrase giving district courts discretion to decide whether exhaustion was "in the interests of justice," CRIPA § 7(a), 94 Stat. 352, as somehow approving procedural default. (U.S. Br. 19-20). But that phrase gave courts discretion to decide whether to require *exhaustion* at all, not discretion over whether to impose a procedural default.[22] Congress' reason for removing it from the statute is perfectly obvious: the PLRA takes away judges' discretion not to require exhaustion, and removal of the phrase makes exhaustion mandatory in all cases.

Indeed, the only legislator cited as referring to *McCarthy*, Representative LoBiondo, objected only to the basic holding "that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only." He further said that the legislation at issue would correct that by "mak[ing] it clear that administrative exhaustion be imposed in all actions arising under the Bivens case." 141 Cong. Rec. H14078-2, H14105 (daily ed. Dec. 6, 1995). He said nothing about procedural default.

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[22] Indeed, there was no discretion to impose a procedural default, as CRIPA did not even authorize dismissal without prejudice. See *Patsy*, 457 U.S. at 511.

In sum, this Court's decision in *McCarthy* cannot remedy the striking absence of statements by any legislator indicating that he or she intended or contemplated a procedural default rule.

POINT III

PETITIONERS' PUBLIC POLICY ARGUMENTS OFFER NO SUPPORT FOR REQUIRING ANYTHING MORE THAN SIMPLE EXHAUSTION

Given the lack of support for a procedural default rule in § 1997e's text and legislative history, Petitioners' primary argument reduces to the contention that Congress *must* have intended such a rule, because without it "Congress's objectives ... would be subverted"—*i.e.*, the PLRA's success in reducing prisoner litigation "will undoubtedly be reversed if inmates are permitted to file suit without first fully invoking the administrative review process." (Pet Br. 19, 22; see U.S. Br. 8 (decision below is "inconsistent with the PLRA's purposes"). This argument, however, fails in multiple ways. *First*, in the absence of evidence that Congress actually *intended* a particular provision, this Court cannot add the provision on the theory that the statute's purposes would be better served with it than without it. *Second*, the argument depends on an oversimplified and inaccurate caricature of the purposes of the PLRA. *Third*, even if one accepts that oversimplified purpose, the argument that it will be defeated if this Court does not read in a procedural default rule is incorrect.

A. Petitioners' Arguments About The Purported Benefits Of A Procedural Default Rule Should Be Directed To Congress, Not This Court

Petitioners' lengthy argument that the purposes of the PLRA would be "subverted" in the absence of a procedural default rule (see Pet. Br. 19-30; U.S. Br. 20-28) is simply not

a legitimate basis for reading the word "exhausted" as "properly exhausted" or adding a procedural default sanction when there is no affirmative evidence Congress intended it. Even if this Court were to believe the omission was inadvertent, the argument that "it is [this Court's] duty to ask how [Congress] would have decided had they actually considered the question" "profoundly mistakes [the Court's] role." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991).

Thus, the Court has repeatedly made clear that it will not "read an absent word into [a] statute," *Lamie*, 540 U.S. at 538, or "engraft [a] policy choice onto the statute," even where the requested rule "undoubtedly would serve the Government's objectives." *Landano*, 508 U.S. at 181. Thus, even if it were true that the PLRA would make more sense with a procedural default rule, "[n]o mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." *Goldenberg*, 168 U.S. at 103. In short, petitioners' policy arguments are "best addressed to Congress, not this Court." *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 28 (1997); see also, *Dodd*, 125 S. Ct. at 2483 (refusing to "rewrite" statute despite "potential for harsh results").

B. Petitioners Cannot Reasonably Contend That The Statutory Purpose Is To Reduce Lawsuits At All Costs

Petitioners' argument that the PLRA's goals require a procedural default sanction is premised on a basic fallacy: that the PLRA's purpose is simply to reduce the volume of frivolous prisoner litigation, and whatever helps to reduce such litigation necessarily serves the purposes of the statute. The fallacy in such a single-faceted view of statutory purpose has been expressly addressed by this Court:

> *[N]o legislation pursues its purposes at all costs.* Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and *it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.*

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam) (emphasis added).

Here, while it is clear that Congress sought to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. at 525, it is also clear that Congress was not willing to enact "whatever furthered" the objective of reducing prisoner litigation. Had that been the sole purpose of the statute, Congress could simply have barred all prisoner litigation from the federal courts (leaving state courts as the only forum for prisoners), or imposed its own shortened limitations period or other procedural traps. That was not the sole purpose, however: the backers of the legislation made clear that they wanted to reduce prisoner lawsuits but to do so in a way that did *not* "prevent inmates from raising legitimate claims. . . . [T]his legislation will not prevent those claims from being raised." 141 Cong. Rec. S14611, S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch); see generally *supra* Point II.

A fair description of the legislative compromise embodied in the statute, therefore, would have to recognize that it was important to Congress not to go too far, and that the statutory purpose was, in essence, "to reduce the volume of inmate litigation while not preventing inmates from pursuing legitimate claims." And a procedural default rule, while serving one statutory purpose, would clearly have been contrary to the purpose of preserving legitimate claims.

Indeed, because no mention of procedural default was made at any point, it is impossible to know whether an express procedural default component might have made the legislation more difficult to pass.

In sum, petitioners improperly assume that "whatever furthers the statute's primary objective must be the law," *Rodriguez*, 480 U.S. at 526, and justifying on that basis the imposition of a procedural default rule would "frustrate[] rather than effectuate[]" Congress' intent. *Id.*

C. Even If Petitioners Were Correct About The Statute's Purpose, Their Claim That § 1997e Is "Meaningless" Without Procedural Default Is Incorrect

Petitioners also err in their claims that "the PLRA's exhaustion mandate is rendered meaningless by a rule that permits prisoners to 'exhaust' state remedies by not complying with the available state process," Pet. Br. 29, and that "Congress' success under the PLRA . . . will undoubtedly be reversed" in the absence of a procedural default rule, *id.* at 22.

As an initial matter, petitioners have made no showing that any part of the dramatic "roughly 50%" drop in the rate of inmate litigation they cite (Pet. Br. 21-22) resulted from a procedural default rule. The drop occurred between 1995 and 2000, *before Pozo v. McCaughtry*, 286 F.3d 1022 (7th Cir. 2002), the first appellate decision to hold that § 1997e imposed a procedural default sanction.[23]

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[23] Previously, many courts dismissed unexhausted claims without prejudice, on the belief that the inmate, even if his grievance was time-barred, could still exhaust. *E.g.*, *Walker v. Maschner*, 270 F.3d 573, 577

More fundamentally, the claim that § 1997e's exhaustion rule is "meaningless" in the absence of a forfeiture rule is demonstrably incorrect. First, prior to the PLRA, an inmate who felt he had been wronged could proceed immediately to federal court. With the passage of § 1997e, the inmate no longer has that option; at a minimum, he must wait until his deadline for filing a grievance passes. By the end of the period, he may no longer wish to file suit.

In addition, because most grievance systems give administrators the discretion to hear untimely grievances, see, *e.g.*, Cal. Code Regs. tit. 15, § 3084.3(c),[24] a prisoner will not be able to bypass the grievance system through the mere passage of time—the discretion to excuse untimeliness will mean his remedies in the grievance system are not "unavailable" under § 1997e. Rather, the prisoner will be required to file an untimely grievance, and thereby give the grievance system what is important under the PLRA: the "*opportunity* to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. at 525 (emphasis added). For this reason, petitioners' citation (Pet. 17) of the statement in *Porter* that Congress was unlikely "to leave the need to exhaust to the pleader's option," 534 U.S. at 530, misses the point: so long as the grievance system may choose to hear his claim, the inmate's remedies are not unavailable, and he cannot get to

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(8th Cir. 2001); see Kermit Roosevelt III, *Exhaustion Under The Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1780-81 (2003) (describing cases).

[24] See also K. Roosevelt, *supra*, 52 EMORY L.J. at 1810 & n.192.

federal court *without* submitting a grievance no matter how artfully he pleads his complaint. [25]

That is what happened in this case: respondent sought informal resolution and then filed his grievance, which concerned an ongoing problem. He thereby gave the grievance system the opportunity to address it. If prison officials choose to decide such a grievance on the merits, they may resolve the case in a way that "obviat[es] the need for litigation." *Id.* at 525. The prisoner may be satisfied by redress obtained through the system; by the explanation he receives; or merely by being given a forum in which to vent his complaint.

Moreover, even if the grievance system rejects the claim as untimely (as it did here), the effort of filing the grievance and proceeding through the system may dissuade the inmate from subsequently filing suit—an example of the exhaustion requirement preventing a lawsuit by "raising the cost" for the prisoner in terms of his investment of time and effort. H.R. Rep. No. 104-2468, § 2 (1995). The fact that Congress required exhaustion even where an administrative grievance was "futile," *Booth*, 532 U.S. at 741 n.6, makes clear that Congress believed there would be benefit to requiring the filing of a grievance even where a resolution that would satisfy the inmate was highly unlikely. Thus, while the exhaustion requirement alone may not reduce the filing of

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[25] Petitioners contend that grievance systems cannot address untimely grievances because they are insufficiently fresh, Pet. Br. 24-25, but offer no reason why claims grow unacceptably stale in grievance systems within 15 business days, when courts are able to tolerate far longer limitations periods.

federal suits by *as much* as would a procedural default sanction, the exhaustion requirement is hardly "meaningless" without procedural default.

Indeed, the absence of a procedural default sanction may spur grievance systems to resolve *more* claims on the merits, because the absence of such a sanction would remove the incentive for jail and prison officials to reject claims on procedural grounds as a way of keeping inmates out of court.

Conversely, relying on jail and prison grievance systems as a basis for procedural defaults may have the perverse effect of involving the federal courts in scrutinizing the adequacy of procedural rules to bar § 1983 actions. See, *e.g.*, *Robertson v. Wegmann*, 436 U.S. 584 (1978). This would run contrary to Congress' goal in the PLRA of *reducing* federal oversight of state prisons.

Finally, the argument that Congress cannot rationally have chosen to require invocation of state remedies without providing for procedural default is rebutted by other schemes following exactly that pattern. First, for many years the habeas exhaustion requirement was not accompanied by a procedural default rule; under *Fay v. Noia*, only a "deliberate bypass" of state remedies barred a claim from federal court. Although that circumstance changed with the creation of the modern procedural default doctrine in *Wainwright v. Sykes* in 1977, the Court's prior rule precludes any argument that requiring exhaustion without a procedural default rule is inherently irrational.

Even closer to the PLRA exhaustion requirement are the schemes at issue in *Oscar Mayer* and *Commercial Office Products*. In those cases, as under the PLRA, the statutory scheme required invoking a state administrative remedy to give the agency a non-binding "opportunity to settle the grievances of ... claimants in a voluntary and localized manner so that the grievants thereafter have no need or

desire for independent federal relief." *Oscar Mayer*, 441 U.S. at 761. The findings of the state agency, as here, had no effect in federal court; the federal suit proceeded *de novo*. In both cases, this Court determined that Congress, despite requiring invocation of state remedies, did *not* intend that command to be enforced through a procedural default rule, stressing that (as here) the claimants were laymen without the aid of attorneys, and the relevant statutes "contained no express requirement of timely state filing." *Commercial Office Prods.*, 486 U.S. at 123; see *Oscar Mayer*, 441 U.S. at 761-64. And the Court expressly rejected the argument that it would be irrational for Congress to require invocation of state remedies without a default sanction to ensure that they were invoked in a timely and proper fashion. *Id.* at 764.

To be sure, the statutes at issue did not use the word "exhaustion," but the substance of what they required is far more similar to what PLRA exhaustion requires than are typical federal administrative schemes. See *supra* n.14. And they show beyond doubt that Congress did not believe the requirement to invoke state remedies would be "meaningless" in the absence of a procedural default rule.

POINT IV

PETITIONERS' REQUEST THAT THIS COURT CRAFT A FORFEITURE RULE BY "ANALOGY" TO HABEAS CASES IS MISCONCEIVED

Petitioners also err in inviting this Court to create a *judge-made* procedural default doctrine by "analogy" to the judge-made default doctrine in habeas cases. Pet. Br. 26. This argument is doubly misconceived, because this Court's power to create that doctrine in habeas stems from an equitable discretion that it lacks here, and because the reasons for the habeas rule are overwhelmingly absent here.

Unlike most circumstances, in which federal courts have a "virtually unflagging obligation" to exercise the jurisdiction granted them, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), in habeas this Court has an "equitable discretion" to craft the scope of the historic writ, including the discretion to create "gateway[s] through which a habeas petitioner must pass before proceeding to the merits of a constitutional claim." *Withrow v. Williams*, 507 U.S. 680, 718 (1993) (Scalia, J., concurring in part and dissenting in part) (internal quotation marks omitted); see also, *e.g.*, *id.* at 716 (equitable discretion is "evident from the [statutory] text . . . provid[ing] that writs of habeas corpus 'may be granted'. . . and enjoin[ing] the court to 'dispose of the matter as law and justice require'") (quoting 28 U.S.C. §§ 2241(a), 2243); *Noia*, 372 U.S. at 438 ("[H]abeas corpus has traditionally been regarded as governed by equitable principles.").[26] It is this equitable discretion that justifies this Court's creation of the procedural default doctrine and other "gateway" doctrines that, for various reasons of policy, limit the otherwise-sweeping grant of habeas jurisdiction. *Withrow*, 507 U.S. at 715-18 (opinion of Scalia, J.) (citing *Fay v. Noia* and *Wainwright v. Sykes*); see also *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (procedural default doctrine is a "body of equitable principles" and is "prudential").

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[26] This discretion is supported by the status of habeas corpus as a writ long shaped by the courts; the recognition of the writ in the Constitution; the language of the habeas corpus statutes; and Congress' recognition of the courts' historic role in defining the writ's boundaries. Cf. *Daniels v. Allen*, 344 U.S. 443, 500 (1953) (Frankfurter, J.) ("By giving the federal courts [habeas corpus] jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims.").

There is no similar authority here to craft a freestanding judge-made doctrine. In the absence of habeas-like "equitable discretion," this Court's unwillingness to "engraft[ing a] policy choice onto [a] statute," *Landano*, 508 U.S. at 181, or "enlarg[ing]" a statute, *Lamie*, 540 U.S. at 538, is fully applicable. Indeed, the judge-made rule petitioners request is particularly inappropriate in that it would permanently bar from federal court cases over which Congress has conferred jurisdiction. See *Col. River*, 424 U.S. at 817 ("virtually unflagging obligation" to exercise jurisdiction in such cases); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("no ... right to decline the exercise of jurisdiction which is given").

In any event, even if the Court did have authority to create a procedural default doctrine not required by § 1997e, the primary basis for the doctrine in habeas is inapplicable here. The doctrine derives from the fact that a habeas petition—unlike an inmate's § 1983 action—is a collateral attack on the prior state-court proceeding, and it is the state proceeding that is supposed to be "the 'main event,' ... rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Sykes*, 433 U.S. at 90. Specifically, the doctrine:

> "has its ... basis in the 'adequate and independent state ground' doctrine". ... [which] provides that federal courts "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision."

Franklin v. Johnson, 290 F.3d 1223, 1230 (9th Cir. 2002) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)); *see Lee v. Kemna*, 534 U.S. 362, 375 (2002).

The procedural default doctrine thus helps to ensure that it is the state trial and not the subsequent habeas proceeding that is the "main event," *Sykes*, 433 U.S. at 90, and is a necessary counterpart to the adequate and independent state ground doctrine, to avoid the anomaly that "a federal district court or court of appeals would be able to review claims that [this Court] would have been unable to consider on direct review." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citing *Coleman*, 501 U.S. at 730-31).

None of these considerations applies here. A prison grievance process that must be exhausted clearly is *not* the "main event"; indeed, any administrative decision has no effect on the subsequent § 1983 suit. Likewise, there is no concern about reviewing a judgment resting on an adequate and independent state ground. This is critical, as that concept provides the foundation for the procedural default doctrine, see *Sykes*, 433 U.S. at 81-82; see also, *e.g.*, *Edwards*, 529 U.S. at 452-53 (referring to procedural default as "'the independent and adequate state ground doctrine'") (quoting *Coleman*, 501 U.S. at 732).[27]

Conversely, sanctioning an inmate litigant with default creates a greater unfairness here than in habeas cases. In habeas, the

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[27] Petitioners argue that under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), federal-state comity is as important in the prison context as it is in habeas cases. However, the basis of the procedural default doctrine is not simple comity; it is that a default is an independent and adequate state ground that precludes federal review on direct appeal and must be equally preclusive in habeas cases– reasoning inapplicable here. *Preiser*, moreover, addressed only the particular category of prisoner claims challenging the fact or duration of imprisonment, which "fell squarely within the traditional purpose of federal habeas corpus." *Id.* at 492 n.10.

prisoner is not losing his primary opportunity to vindicate his rights, because he has already had a full and fair opportunity to assert those rights in the "main event": his state trial. Under the PLRA, the federal claim being defaulted *is* the main event, and is the prisoner's only opportunity to vindicate his federal rights.

Moreover, the *basis* for the default is different. Procedural rules in state courts presumptively provide defendants a fair opportunity to assert their rights, the defendants are often represented by counsel, and the rules are governed by precedent and applied by disinterested judges. By contrast, there is no assurance that grievance procedures comply with basic principles of fairness, they are not governed by established bodies of law, and they are applied by jail and prison employees who, at best, are not judges, and at worst may have an interest in applying the rules in a way that causes inmates to forfeit their federal claims.

In sum, even if this Court had the authority to create an extra-statutory procedural default doctrine here, the analogy to habeas provides no basis for creating one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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